Filed 8/15/19 P. v. Tinoco CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL CARLOS TINOCO,

Defendant and Appellant.

F078510

(Super. Ct. No. F18902785)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Dennis A. Peterson, Judge.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Tracy Yao, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE DISSENTING OPINION

INTRODUCTION

Appellant Manuel Carlos Tinoco contends that the trial court's failure to hold a hearing on his post-plea *Marsden*[1] motion violated his Sixth Amendment right to effective assistance of counsel. Respondent argues Tinoco's claim fails because his (1) motion was untimely, and (2) even assuming that the trial court erred by failing to hold a *Marsden* hearing, any error was harmless because Tinoco had already been sentenced, and there was nothing left for his counsel to do but file a notice of appeal. We conditionally reverse for the reasons set forth below.

STATEMENT OF THE CASE

On April 27, 2018, the Fresno County District Attorney filed a complaint charging Tinoco with corporal injury to a spouse or cohabitant (Pen. Code,[2] § 273.5, subd. (f)(2); count 1) and contempt of court by violating a court protective order (§ 166, subd. (c)(1); counts 2 and 3). The complaint also alleged Tinoco had one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

Tinoco pleaded no contest to count 1, and the remaining counts were dismissed. He also admitted the prior strike conviction, which the trial court later struck.

The trial court referred Tinoco to the Department of Corrections for a diagnostic report (§ 1203.03). The department recommended a state prison term. At sentencing, the trial court denied probation and sentenced Tinoco to the upper term of four years in state prison.

Tinoco filed a timely notice of appeal. The trial court granted a certificate of probable cause.

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[1] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

[2] Undesignated statutory references are to the Penal Code.

STATEMENT OF FACTS[3]

On March 24, 2018, Tinoco and his wife were driving home. Tinoco's wife turned down the loud music that Tinoco was listening to because it made her extremely anxious. Tinoco became upset and turned the music back up. When Tinoco's wife attempted to turn down the music again, Tinoco grabbed her right arm so tightly that it caused a two-inch circular bruise. Tinoco then slapped her left thigh so hard that it left a four-inch diameter bruise.

DISCUSSION

Background

At the end of the sentencing hearing, after the trial court had declined probation and sentenced Tinoco to four years in state prison, the court asked both parties if they had any other issues to raise. The following exchange ensued:

> [Tinoco]: Your Honor, can I say something?
>
> [¶] . . . [¶]
>
> [Tinoco]: I want to file a Marsden motion.
>
> [The Court]: You've been sentenced and you're committed to state prison. Your case is over. You can file an appeal. You have a right to file an appeal within 60 days. You need to file that appeal in this court, not the Court of Appeal, and a copy of the transcripts will be provided for you, if you like.[4]

The hearing concluded after the trial court signed a criminal protective order requested by the prosecution.

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[3] The plea was entered pursuant to *People v. West* (1970) 3 Cal.3d 595. Because the substantive facts are not in dispute on appeal, we provide only a brief recitation of facts from the probation report.

[4] Tinoco's trial counsel also asked the trial court about the restitution amount ordered.

Standard of Review

Under *Marsden*, "[a] defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245.) "Denials of *Marsden* motions are reviewed under an abuse of discretion standard." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

Remand for a *Marsden* Hearing Is Discretionary

A trial court retains discretion to deny a *Marsden* motion as untimely. (*People v. Whitt* (1990) 51 Cal.3d 620, 659 (*Whitt*).) In *Whitt*, the defendant argued that his *Marsden* motion, made on a day set to hear all post-trial motions, should have been granted so that the incompetence of his trial counsel could have been raised as grounds for a new trial. (*Id.* at p. 658.) In holding that the trial court did not abuse its discretion, the California Supreme Court explained:

> "The only reasons given in support of the *Marsden* motion related to counsel's performance before or during the February 1985 special circumstance retrial. Because defendant never indicated dissatisfaction with counsel in the ensuing three- to four-month period, the court had reasonable grounds to question the sincerity of his current criticisms. In any event, the motion could properly be denied as untimely. The court was not required to stop the nearly completed proceeding in its tracks in order to allow another attorney to completely familiarize himself with the case." (*Id.* at pp. 658-659.)

In this case, Tinoco waited until after he had already been sentenced to make his *Marsden* motion, even later than the defendant in *Whitt*. In denying Tinoco's motion, the trial court noted that his case was "over." Tinoco had been sentenced to four years in prison, and there were no additional hearings set. The time for filing a motion to withdraw his plea had also passed. (See § 1018 ["On application of the defendant at any time *before judgment* or within six months after an order granting probation is made if

entry of judgment is suspended, the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."], italics added.)

Citing several cases, Tinoco contends the trial court's lack of inquiry into the factual basis for his request is reversible error. However, the defendants in those cases made their motions prior to being sentenced, so there was still time for any substitute counsel to move for a new trial, move to withdraw a guilty plea, or argue for a more lenient sentence. (See *People v. Reed* (2010) 183 Cal.App.4th 1137, 1141-1143 (*Reed*) [the defendant requested a motion for new trial based on ineffective assistance of counsel prior to the court's pronouncement of his sentence]; *People v. Sanchez* (2011) 53 Cal.4th 80, 84-86 [the defendant indicated a desire to withdraw his plea based on ineffective assistance of counsel prior to the court's pronouncement of his sentence]; *People v. Minor* (1980) 104 Cal.App.3d 194, 197 [the defendant moved to relieve counsel at arraignment].)

Respondent agrees that the trial courts in those cases should have inquired into the factual bases for the defendants' requests, because substitution of new counsel could indeed have affected the defendants' convictions and sentences. In contrast, Respondent submits the trial court's failure to inquire into the factual basis for Tinoco's request was not error, because listening to his reasons for wanting new counsel would not have changed the fact that there was nothing left for the court or counsel to do that could have changed the judgment.

However, in this case it cannot be determined from the record that Tinoco's motion was without merit, because he was not allowed by the court to state the reasons for his request. The defendant's right under *Marsden* to seek the discharge and replacement of court-appointed counsel applies at all stages of a criminal proceeding, including after a defendant is convicted. (*People v. Armijo* (2017) 10 Cal.App.5th 1171, 1179 (*Armijo*).) No formal motion is required, as long as the defendant clearly indicates in some manner that he or she is requesting the discharge and replacement of the

appointed counsel. *(Id.* at p. 1178.) The trial court here improperly precluded defendant from making his case.

Respondent contends that Tinoco no longer had the right to make a *Marsden* motion because he had already been sentenced to state prison, but imposing a term did not complete his sentencing. The court was in the process of modifying its restitution order and imposing a protective order when the motion was made. "Restitution hearings held pursuant to section 1202.4 are sentencing hearings and are thus hearings which are a significant part of a criminal prosecution." (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1386.) "[A] hearing on an amount of restitution to be made to the victim . . . is part and parcel of the sentencing process." (*People v. Cain* (2000) 82 Cal.App.4th 81, 87.) Tinoco also could have made a motion to recall or modify the sentence, which could not have been made before it was imposed. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 465; see, e.g, *People v. Espinosa* (2014) 229 Cal.App.4th 1487, 1497 [treating a trial court's recall of a sentence as made pursuant to the court's authority in section 1170, subdivision (d), even though the motion was filed by the defendant].) Sentencing is a critical stage of the proceedings and a criminal defendant is entitled to counsel to protect his rights at that stage (*People v. Doolin* (2009) 45 Cal.4th 390, 453; see *People v. Rouse* (2016) 245 Cal.App.4th 292, 296-297; *People v. Mejia* (2008) 159 Cal.App.4th 1081.)

Harmless Error

Respondent argues that even if the trial court erred in denying the request for a *Marsden* hearing, the failure to permit a defendant to state his reasons for requesting substitute counsel does not require reversal where the record shows that the failure to hold a hearing on the motion was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Chavez* (1980) 26 Cal.3d 334, 348-349; *Marsden, supra,* 2 Cal.3d at p. 126; *People v. Washington* (1994) 27 Cal.App.4th 940, 944.)

"The issue in a *Marsden* hearing is whether the continued representation by an appointed counsel would substantially impair or deny the right to effective counsel." (*People v. Dennis* (1986) 177 Cal.App.3d 863, 870.) "Whenever [a *Marsden*] motion is made, the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*." (*People v. Smith* (1993) 6 Cal.4th 684, 695.)

Here, we cannot find that the trial court's failure to hold a hearing was harmless beyond a reasonable doubt, as we do not know the reason for Tinoco's request or what defendant planned to do, if anything, in regard to his case. In *People v. Kelley* (1997) 52 Cal.App.4th 568, 580, the court held that error in failing to hold a post-trial *Marsden* hearing can be remedied with a limited reversal. That remedy is appropriate here. (*Armijo, supra,* 10 Cal.App.5th at p. 1184.)

DISPOSITION

The judgment is conditionally reversed and the case is remanded with directions to the trial court to hold a *Marsden* hearing. If Tinoco's request for substitute appointed counsel is granted, the court is directed to appoint new counsel to assist Tinoco, and to entertain such motions as newly appointed counsel may file. The court shall reinstate the judgment if (1) Tinoco's request is denied, or (2) the request is granted but substitute counsel declines to file a motion to withdraw the plea or other appropriate motion, or the court denies any such motion.

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SNAUFFER, J.

I CONCUR:

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DE SANTOS, J.

DETJEN, Acting P.J. , Dissenting.

Manuel Carlos Tinoco (defendant) asserts he was denied his Sixth Amendment right to the effective assistance of counsel when the trial court denied his request for a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. Defendant's request to file a *Marsden* motion, however, was made postsentencing. Denial of that request did not violate his Sixth Amendment right to counsel. The trial court's ruling was not an abuse of discretion.

The Sixth Amendment to the United States Constitution grants a criminal defendant the right to have the assistance of counsel for his defense. This right to counsel "applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake. [Citation.]" (*People v. Crayton* (2002) 28 Cal.4th 346, 362.) Sentencing is a critical stage of a criminal proceeding. (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) With the exception of first appeal as a matter of right (*Douglas v. California* (1963) 372 U.S. 353, 354-358), postsentencing proceedings such as motions seeking sentence modification and collateral attacks do not implicate the Sixth Amendment right to counsel. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 555 [no right to counsel when mounting collateral attack upon conviction]; *People v. Rouse* (2016) 245 Cal.App.4th 292, 298 [no right to counsel when seeking reduction or modification of sentence].)

Here, the first – and only – time defendant asserted a desire for a hearing pursuant to *Marsden* was postsentencing. The majority contends the sentencing was not complete at that point because "[t]he court was in the process of modifying its restitution order and imposing a protective order when the motion was made." (Maj. opn. *ante*, at p. 6.) The record does not support that contention. The trial court was neither "modifying its restitution order" (*ibid.*), nor doing anything other than signing, dating, and serving the protective order.

Defendant was convicted of violating Penal Code section 273.5, subdivision (f)(2).[1] The trial court found defendant not suitable for probation, imposed the aggravated state prison term of four years, stated defendant's time credits, and ordered defendant to pay restitution to the victim.[2] The court set the sections 1202.4 and 1202.45 restitution fines at $1,200.

Section 1202.4, subdivision (b) requires a trial court to order the defendant to pay a "restitution fine." Section 1202.4, subdivision (b)(1) requires that fine in felony convictions to be not less than $300 and not more than $10,000. Section 1202.4, subdivision (b)(2) states the court may determine the amount of the fine by multiplying the minimum fine (here, $300) by the number of years of imprisonment ordered (here, four) by the number of felony counts (here, one). That is what the trial court did. It set the restitution fine at $1,200. That amount is less than the $1,800 amount recommended in the probation report.

Section 1202.45, subdivision (a) states: "In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of [s]ection 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of [s]ection 1202.4."

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[1] Penal Code section 273.5, subdivision (f)(2) states: "Any person convicted of a violation of this section for acts occurring within seven years of a previous conviction under subdivision (e) of [s]ection 243 shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail of not more than one year, or by a fine of up to ten thousand dollars ($10,000), or by both that imprisonment and fine."

Further statutory references are to the Penal Code.

[2] Restitution to the victim is governed by section 1202.4, subdivision (f). Accordingly, the probation report recommended defendant be ordered to make restitution to the victim "[i]n compliance with PC 1202.4(f)." The victim restitution order was not mentioned again, much less "modif[ied]" as asserted by the majority. As such, the majority's reliance on *People v. Dehle* (2008) 166 Cal.App.4th 1380 and *People v. Cain* (2000) 82 Cal.App.4th 81 is misplaced. (Maj. opn. *ante*, at p. 6.)

After setting the restitution fine amount, the trial court ordered samples taken from defendant and imposed fees. This then occurred:

> "[THE COURT:] Anything else, Counsel?
>
> "[PROSECUTOR]: Your Honor, just that we'll be submitting a criminal protective order.
>
> "[DEFENSE COUNSEL]: Your Honor, what was the restitution amount the Court ordered?
>
> "THE COURT: It's in the – oh, no, it's not. I modified it, actually.
>
> "THE DEFENDANT: Your Honor, can I say something?
>
> "[DEFENSE COUNSEL]: $200?
>
> "THE COURT: $1,200. It's $300 per year.
>
> "THE DEFENDANT: I want to file a Marsden motion.
>
> "THE COURT: You've been sentenced, and you're committed to state prison. Your case is over. You can file an appeal. You have a right to file an appeal within 60 days. You need to file that appeal in this court, not the Court of Appeal, and a copy of the transcripts will be provided for you, if you like."

The prosecutor presented the protective order and the court dated, signed and filed it. The defendant was served with a copy of it. A notice of appeal was subsequently filed on behalf of defendant.

As the record shows, the only thing that happened after defendant's request to "say something," was defense counsel asking the court to repeat the amount of the sections 1202.4, subdivision (b) and 1202.45, subdivision (a) restitution fines. The court was not, as stated by the majority, "in the process of modifying its restitution order." (Maj. opn. *ante*, at p. 6.)

All that occurred after defendant's indicated desire to file a *Marsden* motion was the presentation, dating, signing, filing, and serving of the criminal protective order.

As previously stated, defendant was convicted of violating section 273.5, subdivision (f)(2). Section 273.5, subdivision (j) states, in pertinent part: "Upon conviction under subdivision (a),[3] the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. . . . This protective order may be issued by the court whe[n] the defendant is sentenced to state prison . . . ." The dating, signing, filing, and serving of the protective order were merely acts necessary to implement the protective order. I do not see those acts as "imposing" a protective order as the majority asserts (maj. opn. *ante*, at p. 6), but rather implementing it. Those acts did not extend the sentencing to include defendant's indicated desire to file a *Marsden* motion. The sentencing was over before that occurred.

It is true that *Marsden* requires the trial court to give a defendant the opportunity to explain the reasons for desiring a new attorney when the defendant raises the issue during criminal proceedings. (*People v. Sanchez* (2011) 53 Cal.4th 80, 90.) The *Marsden* "inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*." (*People v. Smith* (1993) 6 Cal.4th 684, 695.) Here, however, criminal proceedings were over. There was nothing left for newly appointed counsel to do for defendant. Counsel could not move to withdraw defendant's plea. Such a motion must be made prior to sentencing. (§ 1018.) Counsel could not move to recall and modify defendant's sentence. A defendant does not have standing to bring such a motion. (*Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829,

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3 Subdivision (a) of section 273.5 states, in pertinent part: "Any person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b) is guilty of a felony . . . ."

1833.)[4] Only the court, or other entity listed in section 1170, subdivision (d), may initiate such a procedure. (§ 1170, subd. (d)(1).)

The remand by the majority with the directive for the trial court to hold a *Marsden* hearing and, should defendant's request for new counsel be granted, "to entertain such motions as newly appointed counsel may file" (maj. opn. *ante*, at p. 7) is a waste of public resources. There are no motions available to file.

Defendant's Sixth Amendment right to the assistance of counsel was not impaired. As such, the trial court did not abuse is discretion. (*People v. Webster* (1991) 54 Cal.3d 411, 435.) I would affirm the trial court.

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DETJEN, Acting P.J.

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[4] The majority's reliance on *Dix v. Superior Court* (1991) 53 Cal.3d 442 and *People v. Espinosa* (2014) 229 Cal.App.4th 1487 is misplaced. (Maj. opn. *ante*, at p. 6.) *Dix* did not hold that a defendant could make a motion to recall or modify his or her sentence. To the contrary, it stated the power to recall and vacate a sentence after commitment pursuant to section 1170, subdivision (d) may be exercised only upon the court's own motion, or upon the motion of those parties referenced in the statute. (*Dix*, *supra*, 53 Cal.3d at p. 456.) A defendant is not one of those parties. (See § 1170, subd. (d); see also *id*., former subd. (d).) *Espinosa* did not hold that a defendant could make a motion to recall or modify his or her sentence. *Espinosa* concerned the divesting of jurisdiction in the trial court when an appeal is filed. (*Espinosa*, *supra*, 229 Cal.App.4th at p. 1496.) An exception to that rule is section 1170, subdivision (d). (*Espinosa*, at pp. 1496-1497.) The sentence in *Espinosa* was recalled under section 1170, subdivision (d) and there was nothing improper about it. The fact that the defendant filed a motion to do so did not vitiate that propriety because the trial court invited the motion. (*Espinosa*, at p. 1497.) That invitation was a recall and resentencing on the court's own motion as required by the statute.